

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Excavation of
FACT,
Erickson Lake (Beltrami County) by
AND
Fred and Marie Lahman.
RECOMMENDATIONS

FINDINGS OF
CONCLUSIONS

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis in the Bemidji Fire Hall on June 27, 1985. The record in this matter remained open through September 3, 1985, upon receipt of a final reply from counsel for the Department of Natural Resources.

A.W. Clapp, III, Special Assistant Attorney General, 2nd Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101, appeared on behalf of the staff of the Minnesota Department of Natural Resources (hereinafter "Agency" or "Department" or "DNR"). Fred and Marie Lahman ("Appellants"), Hines, Minnesota 56647, appeared on their own behalf. Prior to the close of the record, the Administrative Law Judge also received an amicus curiae submission from Mark Forthun, Route 1, Box 68, Blackduck, Minnesota 56630.

This Report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Joseph N. Alexander, Commissioner of Natural Resources, Box 37, 500 Lafayette Road, St. Paul, Minnesota 55146 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether Fred and Marie Lahman unlawfully excavated in the bed of Erickson

Lake in 1979 and, if they did, whether they should be required to undertake a project correcting the effects of that excavation.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. During 1874 and 1894, respectively, land surveying plats were issued by the United States General Land Office for Townships 148 (Taylor) and 149 (Hines) North, respectively, in Range 31, 5th Meridian West, Beltrami County. Taken together, the plats show a body of water lying within meander lines

shown in 6 and 7 of Taylor Township (148), with its northern tip extending into 31 of Hines Township (149). That body of water, 106 acres in size, is known today as Erickson Lake.

2. In the fall of 1979, Fred and Marie Lahman employed a contractor to dredge out a 60 foot wide, 5 foot deep portion of "floating bog", running approximately 800 feet in length along and to the lake side of a portion of the shoreline of Erickson Lake. The equipment used in this dredging project was a large scooping device known as a "dragline". The channel thus constructed was built to intersect at a "T" (with the newly-dredged channel represented by the vertical line) With a previously-dug channel -an extension of a watercourse) which lies on the Appellants' property.

3. The Appellants own the shoreline and adjoining land abutting the channel created by the 1979 excavation. They also live on the property. The previously-cut channel (top, or horizontal portion of the "T"), created by a "dragline" operation in 1973, was known to DNR officials at that time, but no action was taken because all of the excavation was on the Lahman property, with no part of it being done in a public water. The last 50 feet of the 800-foot channel also lies within the Appellants' property.

4. On August 17, 1979, the Minnesota Supreme Court, in the case of Lahman v. Commissioner of Highways, 282 N.W.2d 573, held that the watercourse from which the 1973 channel (horizontal part of the "T") had been extended was a "well-established waterway" in which the Lahmans had rights, and that the Highway Department's reconstruction of U.S. Highway 71 north of the Lahmans' property had improperly taken those rights without compensation. The Court ordered the Department to either acquire the water rights by condemnation or "remove the obstruction". The Department ultimately compensated the Lahmans for the taking of their riparian rights.

5. The Lahmans have done several things in an attempt to change the nature of Erickson Lake. The above-described dredging was undertaken in order to increase the flow of fresh water into the Lake, to raise the water level and improve water circulation. In the late 1970s, they aerated the northeast portion of the Lake, which abuts their property, in an attempt to improve fish life and prevent winter kill in the Lake by upgrading the oxygen content of the water. During the last few years, the Appellants have added fill in the vicinity of some beaver dams which lie at the point where a culvert connecting the north and south portions of the Lake channels the natural north to south waterflow (the Lake is part of the Gull River system, which flows out of Gull Lake from northwest to southeast and, ultimately, to the Mississippi River). The culvert was laid by the predecessor to the Burlington Northern Railroad, who constructed a dike-dam across the Lake in connection with construction of

its Bemidji-International Falls line. The damming activity of the Lahmans and the beavers at the culvert's head, as well as debris in the culvert, have resulted in the raising of the water level of the north portion of the Lake by almost two feet over that of the south portion. The difference in Ordinary High Water Level between the two portions is only 3/10 of a foot.

6. In November of 1979, DNR Conservation Officer Byron Dyrland filed charges with the Beltrami County Attorney against Fred Lahman for alleged violation of Minn. Stat. 105.42, subd. 1, which prohibits excavation in

public waters without a prior written permit from the Commissioner of Natural Resources. Mr. Lahman pleaded not guilty and was granted a jury trial in Beltrami County Court.

7. On January 29, 1981, following a two-day trial, Mr. Lahman was convicted by the jury of violating Minn. Stat. 105.42. He appealed to a three-judge District Court panel on February 9, 1981. On August 10, 1981, the District Court Appeals Panel affirmed the conviction, which decision was appealed by Lahman to the Minnesota Supreme Court on October 8, 1981. On November 16, 1981, the Minnesota Supreme Court denied Lahman's petition for appeal.

8. Minn. Stat. 105.541 provides that violation of Minn. Stat. 105.42 is a misdemeanor. Beltrami County Judge Terrence Holter, who presided over Fred Lahman's trial in January of 1981, imposed "No Sentence" upon Mr. Lahman for the jury conviction of January 29, 1981.

9. Beltrami County's Shoreland Management Ordinance No. 6, effective July 1, 1973, does not list Erickson Lake in its Public Waters Classification System. The Lahmans relied on this non-listing as authority for believing that Erickson Lake was not a "Public water" within the meaning and intent of applicable law when they undertook the 1979 dredging of the "floating bog" in the Lake.

10. Erickson Lake was not included in the 1973 Beltrami Public Waters listing because the DNR erroneously presumed that the Lake is located totally within the corporate limits of the City of Tenstrike, Minnesota and was therefore not within the jurisdiction of the public waters program and the County's Shoreland Management Ordinance.

11. Minn. Stat. 105.391 (Waters Inventory and Classification) was amended in 1979, which amendment set out a review and comment process for designating which waters constitute public waters and wetlands. This legislation set a December 31, 1982 deadline for completion of the "inventory" process. During the preliminary stages of that process, the DNR discovered its previous oversight regarding Erickson Lake and recommended inclusion of Erickson Lake in the County Shoreland Management Ordinance listing.

12. After the Department completed the inventory process for Beltrami County, and sent its preliminary recommendations to the Beltrami County Board, including the recommendation that Erickson Lake now be classified as a public water, the Board held informational meetings at various sites throughout the County in accordance with other provisions of Minn. Stat. 105.391. As part of this process, Mr. Lahman recommended dropping Erickson Lake from the list of lakes designated for public waters classification. The Board agreed, and

recommended to the Commissioner of Natural Resources that he drop Erickson Lake from the public waters list.

13. On March 3, 1983, Commissioner Alexander rejected the County's recommendation regarding Erickson Lake, and published notice in the County's legal newspaper that anyone challenging the published designation of specific public waters (including Erickson Lake) could petition to appear at a hearing before a three-person hearings unit. No one filed such a petition in Beltrami

County, and the March 3, 1983 list became final. Commissioner Alexander published the final inventory of Protected (Public) Waters and Wetland for Beltrami County, including Erickson Lake, on January 15, 1985.

14. Minn. Laws Ch. 199, 1, subd. 14(c), effective July 1, 1979, included as "public waters":

All meandered lakes, except for those which have been legally drained;

Subdivision 13 of the same section defined "meandered lakes" as:

. . . all bodies of water except streams lying within the meander lines shown on plats made by the United States General Land Office.

At the time the Lahmans undertook to cut the channel through the floating bog of Erickson Lake, the Lake had been declared a "meandered lake" by statute.

15. On March 20, 1984, a Restoration Order was issued to the Lahmans regarding the 1979 excavation. The Order required them to "plug" the channel by filling in a 50 foot long section thereof, to its original surface elevation of 1,364', starting at the "T" confluence and proceeding northwest (toward the main body of the lake). At their option, the Lahmans were allowed to install a culvert no larger than two feet in diameter within the filled section to abet water flow and circulation from upstream ditch improvements the Lahmans had made. The Lahmans duly appealed that Order, and this hearing process followed.

16. The DNR has attempted to compromise this dispute by allowing the Lahmans to retain the present configuration without alteration if they will convey to the DNR an easement imposing a covenant, called a "Conservation Restriction", limiting future owners of the land in question in their development along the top of the "T". The limitation imposed by the easement is to allow no more than one dwelling unit on the land at the top of the "T", that there be no more than one lot in the designated area, and that only the occupiers of the dwelling unit may use the restricted area for access to the Lake. It is the DNR's concern that the land not be further subdivided, which could lead to the possible development of a marina.

17. It would cost the Lahmans approximately \$6,000 to install the "plug" contemplated by the Department. On June 20, 1985, they sent Commissioner

Alexander a "bill" for "harrassment to myself and my family, taking of private property, damage to private property, mental anguish, health problems, crops damaged, loss of business, loss of time and expenses in work caused by DNR personnel to Fred Lahman and family for a total of \$250,000.00".

Based upon the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Natural Resources have jurisdiction in this matter.

2. All of the procedural requirements of law and rule have been met, and the matter is properly before the Administrative Law Judge.

3. Any of the above Findings of Fact which are more properly designated as Legal Conclusions are hereby adopted as such.

4. In September of 1979, Fred and Marie Lahman caused the excavation of an 800 foot long, five foot deep and 60 foot wide channel in the cross section of Erickson Lake, a public water, without obtaining a written permit from the Commissioner of Natural Resources for that excavation.

5. Erickson Lake is a public water because it is a meandered lake within the meaning of Minn. Stat. 105.37, subd. 13.

6. Erickson Lake is a public water for the purposes of this proceeding because it was found to be such by a Beltrami County Criminal Court jury in the misdemeanor trial of Fred Lahman on January 29, 1981. That verdict, upheld on appeal to the District Court and the Minnesota Supreme Court, has become final and, therefore, is binding upon the Administrative Law Judge and the Commissioner under the doctrine of res judicata.

7. Erickson Lake is a public water due to its designation as such in the final inventory of Protected (Public) Waters and Wetlands for Beltrami County, published by the Commissioner of Natural Resources on January 15, 1985, following legal procedures outlined in Minn. Stat. 105.391.

8. The separate determination in this proceeding that Erickson Lake was a public water when the Lahmans excavated in it without a permit is not barred, under the prohibition against double jeopardy, by the previous determination of the same issue in the criminal trial of Fred Lahman.

9. The Lahmans have the burden of proof to show that they should be granted a permit for the excavation they caused to be done in Erickson Lake; they have not shown that a permit for their work should be granted without restrictions.

10. Imposition of the regulatory scheme of Minn. Stat. 105 and Rules adopted thereunder upon the Lahmans does not constitute an impermissible "taking" of their property without compensation.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATIONS

IT IS HEREBY RECOMMENDED that the Commissioner of Natural Resources GRANT a permit to Fred and Marie Lahman for construction of a previously-excavated

channel in the bed of Erickson Lake, conditional upon the grant of a Conservation Easement from the Lahmans to the Department of Natural Resources,
which Easement restricts future development along the channel and the "T" basin formed (in part) by the channel to one residential lot, with one residential dwelling thereon, with lake access facilities only for the use of
the occupants of the single dwelling; and

IT IS FURTHER RECOMMENDED that, if the above-described Conservation Easement is not granted on or before January 15, 1986, that the Lahmans be DENIED a permit and required to fill the southeast (back) 50 feet of the channel to the Ordinary High Water Level of Erickson Lake, with an option to construct a culvert, no larger than two feet in diameter, within the filled-in portion of the channel in order to allow the natural transfer of surface and riparian water flow from the eastern portions of the Lahman property into Erickson Lake.

Dated this day of October, 1985.

RICHARD C. LUIS
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped

MEMORANDUM

In determining whether or not the channel construction by the Lahmans in 1979 constituted illegal excavation of a public water, the Administrative Law Judge began his analysis with two admissions by the Lahmans: (1) a digging was done through a floating bog located on the lake side of the shoreline; and (2) the Lahmans admitted never having applied for a permit. The only remaining question, then, is whether the Lake is "public water".

It was concluded above that Erickson Lake is a public water on three different grounds. First, it is a meandered lake. This was determined by surveys of the United States General Land Office completed before the end of the 19th Century. Legislation effective July 1, 1979 made all meandered lakes (which had not been legally drained) "public waters". The dragline operation in the bed of Erickson Lake was started by the Lahmans at least two months after that date. Second, a criminal court jury issued a verdict containing, as one of its elements, a finding that the Lake was a public water at the time the Lahmans did the excavating in question. This verdict, determining beyond a reasonable doubt (a higher standard of proof than that required herein --

which is a preponderance of the evidence) the same issue that is before the Administrative Law Judge and the Commissioner in this proceeding, is binding herein and constitutes the law of the case under the legal principle of res judicata ("the matter adjudged"). Therefore, the Lahmans are collaterally estopped by Fred Lahman's criminal conviction from arguing in this civil proceeding that the Lake is not what the jury found it to be. See, Travelers

Insurance Company v. Thompson, 281 Minn.. 547, 163 N.W.2d 289 (1969).

Finally,

Erickson Lake has now been inventoried as a "public water" on the list of Protected (Public) Waters and Wetlands of Beltrami County. The only reason it

was not inventoried as such earlier is because DNR officials erroneously believed that it lie totally within the corporate borders of a municipality (Tenstrike), and therefore was outside the jurisdiction of the County Shoreland Management Ordinance. This oversight was finally corrected in the

latest (early 1980's) inventory process, a process in which the Lahmans objected early, only to withdraw later. Although the designation of Erickson

Lake by inventory did not occur until after the Lahmans had the excavation completed, it still stands as a ground for holding that the Lake was a "public

water" in September, 1979 because the inventory process is designed as an identification procedure, not a creation, in itself, of a public water where one did not previously exist.

The Lahmans' argument that their case places Fred Lahman in double jeopardy is misplaced. The constitutional prohibition against double jeopardy

operates to protect a person from being tried twice in a criminal court for the same act. This is not a criminal proceeding, but a civil matter in which

the Commissioner of Natural Resources has issued a Restoration Order and the Appellants are seeking a permit for their excavation. As the Minnesota Supreme Court pointed out in the Matter of the Estate of Congdon, 309 N.W.2d 261 (Minn. 1981);

It is well established that the prohibition against double jeopardy does not preclude separate civil and criminal proceedings based on the same incident. 309 N.W.2d at 270.

The above Recommendation was made in recognition of the Appellants' well-presented argument that what they have done may, in fact, constitute an improvement in the quality of the Lake. The Department has recognized this by

proposing, in an earlier compromise attempt, that the present situation be allowed to exist so long as the Lahmans agree to grant an easement to the Department restricting further development of the "T" channel. The Administrative Law Judge believes that such a compromise will satisfy both the

Appellants' desire to improve the water quality and the Department's concern about the potential development of a marina. In the alternative, if the Lahmans do not grant the recommended easement, they should be required to "plug" the excavated channel. Under that alternative, they can still improve

the quality of the Lake with a constant flow of fresh water by placing a pipe

through the "plug" to transfer water from the eastern side of their land. The

costs involved in that alternative can be avoided by a granting of the easement.

The recommended restrictions do not violate any constitutional prohibition against the taking of property without compensation. The Appellants are mistaken in their belief that the State cannot regulate what they do with their land, when usage of that land has an impact upon public waters. As the Minnesota Supreme Court stated in State v. Kuluvar, 266 Minn. 408, 123 N.W.2d, 699, 706 (1963):

It is fundamental in this state and elsewhere, that the state in its sovereign capacity possesses a proprietary interest in the public waters of the state. Riparian

rights are subordinate to the rights of the public and subject to reasonable control and regulation by the state. Section 105.42 regulates the property rights of a riparian owner only to the extent of prohibiting any interference with the waters adjoining if such waters are public waters and if the interference is detrimental to public use. Such a regulation cannot be regarded as unreasonable and certainly not as taking property without compensation. When it is established that the public has access to waters capable of substantial use by all who so desire, the statute directs that the state fulfill its trusteeship over such waters by protecting against such interference by anyone, including those who assert the common law rights of a riparian owner.

For the reasons outlined above, the Commissioner should enforce his Restoration Order of March 20, 1984 if the Lahmans refuse to grant the Department the recommended Conservation Easement.

R.C.L.